No. (1)

86 1693

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In Re Grand Jury Subpoena Duces Tecum
Dated December 14, 1984
Y, M.D., P.C.,

Petitioner,

—v.—

HON. EDWARD KURIANSKY,
Deputy Attorney General of the State of New York,

Respondent.

In Re Grand Jury Subpoena Duces Tecum
Dated December 14, 1984,
X, M.D.,

Petitioner,

—v.—

HON. EDWARD KURIANSKY,
Deputy Attorney General of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED

WHETHER THE PROPRIETOR OF A ONE-PERSON PROFESSIONAL CORPORATION, IN RESPONSE TO A SUBPOENA SEEKING TO COMPEL THE CORPORATION TO PRODUCE DOCUMENTS, MAY ASSERT THE PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN THE ACT OF PRODUCTION WOULD TEND TO INCRIMINATE HIM.

WHETHER AN INDIVIDUAL MAY ASSERT THE PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN RESPONSE TO A SUBPOENA SEEKING TO COMPEL THE INDIVIDUAL TO PRODUCE PRIVATELY HELD RECORDS THAT ARE "REQUIRED BY LAW TO BE KEPT," WHEN THE ACT OF PRODUCTION WOULD TEND TO INCRIMINATE HIM.

PARTIES

The parties are X, M.D., and Y, M.D., P.C.,[1] petitioners, and Hon. Edward Kuriansky, New York State Deputy Attorney General for Medicaid Fraud Control, respondent.

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[1] With the permission of the New York State courts, the designations "X" and "Y" have been substituted for the names of the physician petitioners.

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OPINIONS BELOW

The opinion of the New York Court of Appeals, the judgment of which is sought to be reviewed, was decided and filed February 19, 1987. The opinion is reported at 69 N.Y.2d 232. It is set forth in the Appendix at 1a-12a.

The Opinion of the New York Supreme Court, Appellate Division, First Department, is reported at 113 A.D.2d 49, 495 N.Y.S.2d 365, and is set forth in the Appendix at 13a-22a. The Opinions of the New York Supreme Court, Trial Term, have not been reported, and are set forth in the Appendix at 27a-32a.

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V.

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

JURISDICTION

The judgment of the New York Court of Appeals was entered February 19, 1987.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

On or about December 14, 1984, respondent, the New York State Attorney General for Medicaid Fraud Control, issued grand jury subpoenas to petitioners X, M.D., and Y, M.D., P.C.[1] to produce certain documents before the grand jury. X and Y are psychiatrists who practice on Manhattan's Lower East Side.

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[1] "P.C." is an abbreviation for "professional corporation." Such "professional service corporations" are special entities established and regulated in New York State by Article 15 (§§1501 et. seq.) of the Business Corporation Law, and do not enjoy all of the advantages of corporate status. Under §1505(a), shareholders, employees, and agents of a professional service corporation, unlike their counterparts in other types of New York corporations, remain personally liable for negligent and wrongful acts or misconduct in the course of performing professional services for the corporation. In addition, certain New York State tax regulations compute tax payments for professional service corporations as if they were sole proprietorships.

The subpoena issued to petitioner X, M.D. called for petitioner X to produce for the grand jury such records "as required by law to be kept," which reflected the evaluation and treatment of certain listed patients and disclosed fully the extent of care, services and supplies provided those patients under the New York State Medicaid Program. The subpoena issued to Y, M.D., P.C., commanded that "[a]ny Officer, Director or Managing Agent" of Y, M.D., P.C. produce designated payroll records, personnel files for all employees, and patient charts for certain listed patients.

Both petitioners moved to quash the respective subpoenas on two grounds: first, that compelled production of the documents subpoenaed would violate their constitutional privileges against self-incrimination; and, second, that New York State's physician-patient privilege, codified in §4504 of the New York Civil Practice Law and Rules (CPLR), prohibited disclosure of the subpoenaed documents.

The Trial Term Court denied petitioners' motion in its entirety, on the grounds, *inter alia*, that with respect to X, M.D., the Fifth Amendment "act of production" privilege was overridden by the "required records" exception (A. 30-32),[2] and that with respect to Y, M.D., P.C., the "act of production" privilege was overcome by both the "required records" exception and the "corporate records" exception. A. 27-29.

Petitioners timely filed an appeal to the Appellate Division, First Department, which affirmed the Trial Term's decision in regard to petitioners' invocation of the Fifth Amendment "act of production" privilege. A. 16-18.[3]

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[2] References herein to "A" are to the Appendix to the Petition.

[3] The Appellate Division reversed that portion of the Trial Term's ruling that held that the physician-patient privilege did not prevent compliance with the subpoena. The Appellate Division ruled that a prosecutor must show, at an *in camera* inspection by the trial court, a "particularized need" for records otherwise covered by the privilege. A. 21.

Petitioners were granted leave to appeal to the New York Court of Appeals, which affirmed the decisions of the Appellate Division and Trial Term concerning petitioners' assertion of their Fifth Amendment "act of production" privilege. A. 8.[4]

Upon petitioners' application on March 13, 1987, the Trial Term stayed all proceedings in this matter pending the filing of this Petition.

REASONS FOR GRANTING THE WRIT

There are several compelling reasons for granting the writ. With respect to its ruling concerning corporate records, the New York Court of Appeals decision below conflicts with this Court's decision in *United States v. Doe*, 465 U.S. 605, 104 S. Ct. 1237 (1984), regarding the privilege against self-incrimination in the context of the compelled production of documents. The decision below also conflicts with opinions of the United States Courts of Appeals — which decisions themselves are in disagreement — that have followed this Court's ruling in *Doe*.

In addition, with respect to its holding concerning both corporate records and required records, the decision below determined important questions of federal law which have not been, but should be, settled by this Court.

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[4] The New York Court of Appeals modified somewhat the Appellate Division's decision regarding the physician-patient privilege. While holding that the privilege remained intact in the context of a Medicaid investigation, the Court held that prosecutors were not obligated to demonstrate any "particularized need" for medical records that were otherwise privileged. Rather, the Court ruled that a claim of privilege need be considered only if the records sought contain "highly sensitive matter having no apparent relevance to the Medicaid investigation," and that disclosure to Medicaid investigators should be authorized if the investigators demonstrate that the record in question "reasonably and minimally comes within the scope of the investigation [.]" A. 7. In light of its determination, the Court of Appeals remitted the matter to the Trial Term to permit petitioners to satisfy the initial burden of establishing which records contained highly sensitive material apparently bearing no relevance to the investigation. A. 7-8.

Moreover, during the 1985 Term this Court granted a writ in a case presenting virtually identical issues, *See v. United States*, No. 85-1987, *cert. granted*, _____ U.S. _____, 107 S. Ct. 59 (1986), and received briefs on the merits. However, the case was rendered moot by the disposition of the underlying matter before oral argument. The petition for certiorari was, therefore, dismissed pursuant to Supreme Court Rule 53. 107 S. Ct. 918. For the reasons detailed below, the questions presented here are even more crystallized than in *See*, and, therefore, this case offers an even better opportunity to address the important federal questions not resolved in *See* because of the withdrawal.

I. *THE DECISION BELOW IS IN CONFLICT WITH DECISIONS RENDERED BY UNITED STATES COURTS OF APPEALS*

The New York Court of Appeals decision below, which held the "act of production" privilege inapplicable to the production of corporate documents, is in direct conflict with rulings by United States Courts of Appeals. In turn, the federal appellate courts, in applying this Court's opinion in *Doe*, have disagreed among themselves in their approach to determining and solving questions raised in the context of subpoenas for corporate records.

In *United States v. Doe*, 465 U.S. 605 (1984), this Court held that while the contents of a document may not be within the ambit of the Fifth Amendment's privilege against self-incrimination, an individual's act of producing such non-privileged material may well be privileged, and, consequently, cannot be compelled absent a grant of statutory use immunity pursuant to 18 U.S.C. §6002 *et. seq*. *See also Fisher v. United States*, 425 U.S. 391, 400 (1976).

That clear enunciation of the principle notwithstanding, the federal appellate courts, in cases subsequent to *Doe*, have issued divergent opinions in regard to whether an individual's production of corporate documents is protected by the Fifth

Amendment, or whether the corporate character of the records vitiates the privilege defined in *Doe*.[5]

For example, in *In re Grand Jury Empanelled 3-22-83*, 773 F.2d 45, 47 (3d Cir. 1985), the Third Circuit Court of Appeals, confronting the question directly, held unambiguously that "a custodian of corporate records who is subpoenaed to produce them cannot be held in contempt for failure to do so if he demonstrates that such production would in fact tend to incriminate him." *See also In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (*en banc*).[6]

Similarly, the Second Circuit, in *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 55 (2d Cir. 1985), while more narrowly circumscribing the Fifth Amendment privilege, acknowledged that "in certain circumstances a custodian of records may have a fifth amendment right to refuse to comply with a subpoena directing him, individually, to produce records when the act of producing them would constitute self-incriminating testimony." The Fourth Circuit reached the same conclusion in *United States v. Lang*, 792 F.2d 1235, 1240-41 (4th Cir. 1986).

The Sixth and Eighth Circuits also acknowledge the applicability of the privilege to the act of producing corporate documents, but have come to different conclusions from those reached by the Second, Third and Fourth Circuits. The Sixth

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[5] Debate has ensued even within individual Courts of Appeals. The decisions in the two circuits that have considered the issue *en banc* (and which reached different conclusions) have included lengthy and impassioned dissents. *See In re Grand Jury Matter Brown*, 768 F.2d 525, 523 (3d Cir. 1985) (*en banc*) (Garth, J., *dissenting*); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir. 1985) (*en banc*) (Jones, J., *dissenting*), *cert. denied*, ___ U.S. ___, 106 S. Ct. 594 (1985).

[6] A Florida state appellate court also has held that *Doe* requires that immunity be granted to a custodian of corporate documents for purposes of producing those records. *See Florida v. Wellington Precious Metals, Inc.*, Fla. Dist. Ct. App., slip op. 85-1432 (March 25, 1986).

and Eighth Circuits have held that a custodian of records must comply with a subpoena for corporate documents, but have specified that "if the government later attempts to implicate [the individual who produces the records] on the basis of the act of production, evidence of that fact is subject to a motion to suppress." *In re Grand Jury Subpoena (See)*, 784 F.2d 857 (8th Cir. 1986), *cert. granted* _____ U.S. _____, 107 S.Ct. 59 (1986), *petition dismissed*, _____ U.S. _____, 107 S. Ct. 918 (1987), *quoting In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.)(*en banc*), *cert. denied*, _____ U.S. _____, 106 S. Ct. 594 (1985).

The Fifth Circuit, while holding that a custodian's act of producing documents of a corporation (as opposed to those of a sole proprietorship) will not ordinarily be subject to a privilege, nevertheless did quash that portion of a subpoena that would have required a "communicative disclosure" by the custodian in the course of producing the documents. *In re Grand Jury Subpoena (Lincoln)*, 767 F.2d 1130, 1131 (5th Cir. 1985).

Finally, the Ninth and Tenth Circuits, in decisions issued very shortly after *Doe*, and with minimal discussion, concluded that the production of corporate records was unaffected by *Doe*, and, therefore, did not afford an individual any privilege related to the "act of production." *In re Vargas*, 727 F.2d 941, 946 (10th Cir. 1984); *United States v. Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984). The Eleventh Circuit followed suit in *In re Grand Jury Subpoena Duces Tecum (Ackerman)*, 795 F.2d 904 (11th Cir. 1986).

Thus, the federal Courts of Appeals decisions concerning the viability of the "act of production" privilege in response to subpoenas seeking corporate documents cover a wide and divergent spectrum.[7] In fact, in its opposition to a petition for a writ of

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[7] The disagreement has extended to the commentators who have written on the subject. Two would abandon any distinction for corporate custodians and documents in regard to the "act of production" privilege, thereby affording them the protection set forth in *Doe*. *See* Mosteller, "Simplifying Subpoena Law: Taking the Fifth Amendment Seriously," 73 Va. L. Rev. 1 (1987),

(Footnote Continued)

certiorari in *Morganstern v. United States*, Case No. 85-658, *cert. denied* _____ U.S. _____ , 106 S.Ct. 594, the government recognized that in this area "... the decisions of the courts of appeals exhibit considerable disagreement regarding the governing legal rules in this area...." Memorandum for the United States in Opposition, at p.3.[8]

The varying means employed by the Courts of Appeals to solve the problems precipitated by this question illustrate the need for clarity and uniform standards in such cases, which guidance can be provided only by this Court. Therefore, the clear conflict among the federal Courts of Appeals and the decision below by the New York Court of Appeals provide ample justification for the grant of the writ of certiorari by this Court in this case.

II. *THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT*

This Court, in its decisions in *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984), established that the production of a sole proprietor's business papers in response to a subpoena involves potentially incriminating testimonial evidence that is protected by the Fifth Amendment privilege against self-incrimination. The issue upon which this Court focused in regard to the "act of production" was not the content of the records, or by what entity they were

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and Comment,"Organizational Papers and the Privilege Against Self-Incrimination," 99 Harv. L. Rev. 640 (1986). Another would prohibit invocation of the privilege in the corporate context. *See* Heidt, "The Fifth Amendment Privilege and Documents – Cutting *Fisher's* Tangled Line", 49 Mo. L. Rev. 439 (1984).

[8] The Appellate Division, First Department, in discussing this issue below, mentioned the difference of opinion among the federal Courts of Appeals, but declined to adopt petitioners' position absent explicit endorsement by this Court. A. 16-17. The New York Court of Appeals, in its opinion below, also stated it would not depart from its previous rulings because *Doe* and *Fisher* did not "expressly overrule the prior cases." A. 8.

generated, but instead was whether compliance with the subpoena, through production of documents, would result in compelled testimonial evidence.

As the Third Circuit, *en banc*, pointed out in *In re Grand Jury Matter (Brown)*, *supra*, this Court's decisions in *Fisher* and *Doe*,

> consistent with *Schmerber v. California*, [348 U.S. 757 (1966)], make the significant factor, for the privilege against self-incrimination, neither the nature of the entity, nor the contents of documents, but rather the communicative or noncommunicative nature of the arguably incriminating disclosure sought to be compelled.

768 F.2d at 528. *See also In re Kave*, 760 F.2d 343, 356 (1st Cir. 1985) (*Fisher* and *Doe* "ended the content-oriented approach to fifth amendment protection"); *United States v. Schlansky*, 709 F.2d 1079, 1082 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099, 104 S. Ct. 1591 (1984) ("The central issue is no longer the nature of the materials whose production is compelled. Instead, the question is whether their production involves testimonial communication on the part of the person to whom a summons or subpoena is directed").

The decision below of the New York Court of Appeals, however, focused precisely on the nature of the entity – with respect to Y, M.D., P.C., a corporation – and the nature of the materials – with respect to X, M.D., and Y, M.D., P.C., "required records" – in denying petitioners Fifth Amendment protection. Thus, the conflict between the decision below and decisions of this Court provide further and independent support for the granting of the writ of certiorari in this case, as to both questions presented.

III. *THE DECISION BELOW DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT*

In the alternative, to the extent the decision below is not in conflict with decisions of either this Court or the federal Courts of Appeals, the ruling below decided important issues of federal law that have not yet been, but should be, settled by this Court.

A. *Uniformity Is Needed in Regard to the Scope of "Act of Production" Protection With Respect to Subpoenas for Corporate Documents*

The material inconsistencies among the several solutions devised by the Courts of Appeals to the "act of production" problems caused by subpoenas for corporate documents demonstrate vividly the need for determination of this issue by this Court.

For example, the Third Circuit permits a custodian of corporate records to assert the Fifth Amendment privilege. *In re Grand Jury Matter Brown, supra*. The Ninth, Tenth and Eleventh Circuits do not recognize such an invocation as valid. *In re Vargas, supra*; *United States v. Malis, supra*; *In re Grand Jury Subpoena Duces Tecum (Ackerman), supra*.

The Second and Fourth Circuits permit a custodian to utilize the privilege, but would compel the corporation to appoint someone for whom production would not be arguably incriminatory to perform the custodian's function of production. *In re Two Grand Jury Subpoenae Duces Tecum, supra*; *United States v. Lang, supra*. However, the precise limits of this approach are not clear. *Compare Rogers Transportation, Inc. v. Stern*, 763 F.2d 165, 167-68 (3d. Cir. 1985) and *United States v. Sancetta*, 788 F.2d 67 (2d Cir. 1986).[9]

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[9] Here, the subpoena served on Y, M.D., P.C. was directed not at a custodian of records, but at "Any Officer, Director, or Managing Agent" of Y, M.D., P.C. Y is the only person who falls into any of these categories. A. 2. *See In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d at 54-55; *In re Grand Jury Subpoenas Issued to Thirteen Corporations*, 775 F.2d 43, 45-46 n.4 (2d Cir. 1985), *cert. denied* _____ U.S. _____, 106 S. Ct. 1459 (1986).

The Sixth and Eighth Circuits have formulated yet another answer; they would compel production, but prevent the government from using evidence of the act of production against the person compelled to produce the documents. *In re Grand Jury Subpoena (See), supra*; *In re Grand Jury Proceedings (Morganstern), supra.*[10]

In opposition to the petition for certiorari in *See v. United States, supra*, which, as noted earlier, this Court granted, the Solicitor General, while arguing that he considered that case to present an inappropriate factual context for consideration of this question, noted, "The disagreement between the Third Cicuit and the other circuits regarding the effect of the *Doe* case on corporate records is a matter that may well merit review by this Court in an appropriate case." Brief for the United States in Opposition, at p.6.[11]

This Court, of course, ultimately decided that *See* was an appropriate case for determination of this question. This case presents an even more appropriate factual setting for disposition of this question. The subpoena for the records of Y, M.D., P.C. raises the question in the most pristine environment possible, without involvement of either third parties or the attorney-client privilege, which, the Solicitor General argued, complicated matters in *See*.

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[10] This judicially granted constructive use immunity was expressly disapproved by this Court in *Doe*. 465 U.S. at 616.

[11] In *See, supra*, the "Question Presented" by petitioner read as follows:

> Whether the privilege against self-incrimination, guaranteed by the Fifth Amendment to the Constitution of the United States may be asserted by an individual in response to a subpoena seeking to compel production of corporate documents.

Petition for A Writ of Certiorari, at p. I.

The lack of uniform law in these recurring situations is revealed further by the United Stated Government's brief opposing the petition in *See*, in which the Solicitor General urged an approach never before articulated by this Court or any Court of Appeals. He suggested that See, the attorney for the target of the investigation, had become, by her possession of corporate documents delivered to her by her client, the type of substitute, neutral custodian of records from whom production would not be personally incriminatory and, therefore, would be acceptable. Brief for the United States in Opposition, at p.8.

Thus, it is clear that this Court's opinions in *Fisher* and *Doe* have failed to clarify the constitutional law governing compelled document production – which clarification was the evident intent of this Court – and, in fact, have resulted in substantial disarray in the lower courts.

Already, by granting a writ of certiorari in *See v. United States*, *supra*, this Court has signaled the importance of this issue, and the need for resolution in order that the lower courts know the parameters of the "act of production" privilege in the context of subpoenas seeking corporate documents.[12]

The factual posture of this case facilitates concentration on the integral issue: Y, M.D., P.C. is a one-person corporation, with the subpoena served on the corporation for the purpose of obtaining corporate records. Thus, this case offers this Court the ideal opportunity to end the debate.

B. *The Applicability Of "Act Of Production" Protection To "Required Records" Is Unclear And Has Not Been, But Should Be, Settled By This Court*

In *United States v. Doe*, *supra*, this Court removed the logical underpinnings from the rule that there is not any Fifth Amendment privilege with respect to records that are required by law

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[12] As noted *ante*, at n.7, the importance of this issue is reflected also in the increasing attention it has attracted from commentators and scholarly publications. In addition, the New York State District Attorneys Association, in its Brief Amicus Curiae below, described the issue as one of "wide importance and profound concern" to its members.

to be maintained. In *Doe*, this Court held that the contents of a document are not privileged if the document is prepared voluntarily. 465 U.S. at 610-12, 104 S. Ct. at 1241-42. Seemingly, therefore, involuntarily prepared records – such as records that are required by law to be kept – are privileged.

Thus, the continued existence of an exception to the Fifth Amendment privilege for "required records" perpetuates an anomalous situation: voluntarily prepared records are not within the scope of the Fifth Amendment privilege, but, at the same time, records prepared by statutory or regulatory compulsion are within the scope of the privilege, but constitute an exception to it.

In addition, as noted *ante*, at 9, this Court's decisions in *Fisher* and *Doe* dispense with any analysis of the content of business records, the public character of which is a fundamental precept of the "required records" doctrine. Instead, the decisions in *Fisher* and *Doe* concentrate inquiry on the act of production, *not* the nature of the documents or the circumstances of their creation. *See In re Grand Jury Matter Brown*, *supra*; *In re Kave*, *supra*.

Recognizing the adverse impact this Court's decision in *Doe* had upon the "required records" exception, the Second Circuit posed the query whether "the required records exception, which was a response to the *Boyd* privacy rationale, is still viable after the shift away from the privacy rationale." *United States v. Edgerton*, 734 F.2d 913, 918 n.4 (2d Cir. 1984).[13]

Further, the "required records" doctrine has been much criticized since its adoption by a 5-4 decision of this Court in

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[13] However, without addressing the logic of the doubts raised in *Edgerton*, *supra*, the Second Circuit and the two other federal Courts of Appeals have found the validity of the "required records" exception to the Fifth Amendment unaffected by *Doe*. *In re Two Grand Jury Subpoenae Duces Tecum Dated August 21, 1985*, 793 F.2d 69 (2d Cir. 1986); *In re Grand Jury Proceedings (John Doe, M.D. and Steven Roe)*, 801 F.2d 1164 (9th Cir. 1986); *In re Grand Jury Subpoena Served Upon Underhill*, 781 F.2d 65, 69-70 (6th Cir. 1986).

Shapiro v. United States, 335 U.S. 1 (1947). *See, e.g., In re Doe*, 711 F.2d 1187, 1194-99 (2d Cir. 1983) (Friendly, J., *dissenting*); Mansfield, "The *Albertson* Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information," 1966 Sup. Ct. Rev. 103, 148-49.

The two premises of the exception – that production admits little of significance because of the public aspects of the documents, and that conducting business in fields that require record-keeping constitutes a "waiver" of the Fifth Amendment privilege – have been, with respect to the contents of the documents, abandoned by this Court's departure from content-oriented analysis in favor of the focus on the incriminatory nature of production, and, with respect to "waiver," repudiated by subsequent decisions of this Court. *See, e.g. Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men v. Commissioner*, 392 U.S. 280 (1968). *See also Marchetti v. United States*, 390 U.S. 39 (1968).

In *Doe* this Court expressly left undecided the applicability of the "act of production" privilege in the context of "records required by law to be kept or disclosed to a public agency." 465 U.S. at 607, n.3. Now that this Court's decisions in *Fisher* and *Doe* have left the "required records" exception bereft of its logical foundation, and its utility as law (since the contents of business records are not privileged any longer), it is respectfully submitted that this Court should settle this open and important question of federal law.

CONCLUSION

For all the reasons set forth above, it is respectfully submitted that this Court should grant a writ of *certiorari* herein.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE NEW YORK COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

No. 10

In re Grand Jury Subpoena Duces Tecum Dated December 14, 1984

Y., M.D., P.C.,

Respondent-Appellant,

—v.—

HON. EDWARD KURIANSKY, &C.,

Appellant-Respondent.

OPINION

In Re Grand Jury Subpoena Duces Tecum dated December 14, 1984.

X., M.D.,

Respondent-Appellant,

—v.—

HON. EDWARD KURIANSKY, &C.,

Appellant-Respondent.

Edward Kuriansky, Deputy Attorney General (Robert Dublirer & Donald H. Zuckerman of counsel) appellant/respondent pro se.

Gerald B. Lefcourt, Erica Horwitz, & Joshua L. Dratel, NY City, for respondent/appellant Y. Lawrence S. Goldman & Roger Parloff, NY City, for respondent/appellant X.

WACHTLER, CH. J.:

The physician-patient privilege originated in this State. It did not exist at common law and the first statute to recognize the privilege was adopted by the New York Legislature in 1828. This case tests that privilege against a grand jury subpoena.

Petitions, two psychiatrists, have moved to quash subpoenas requiring them to produce records before a Grand Jury investigating complaints of Medicaid fraud. Their primary contentions are that compliance with the subpoenas will violate their Fifth Amendment rights, as well as the physician-patient privilege granted to their patients by statute (CPLR 4504). The trial court denied the motion but the Appellate Division modified, concluding that the physician-patient privilege applied, except as to matters necessary to the investigation, and ordered an *in camera* inspection to determine which portions of the records should be disclosed. Both sides have appealed by leave of the Appellate Division.

The Deputy Attorney General in charge of the investigation argues that the physician-patient privilege does not apply to Medicaid fraud investigations and that the records should be produced without a showing of need. The petitioners, on their cross appeal, argue that the act of producing the records would constitute self-incrimination and therefore, the motion to quash should have been granted. In the alternative, they argue the modification was proper.

The petitioners are practicing psychiatrists with offices in the City of New York. Dr. X is a sole practitioner; Dr. Y has been practicing as a professional corporation since 1980. He is the sole shareholder, officer and employee of the corporation. Both doctors are Medicaid providers, who from 1981 to 1983 received considerable sums for services performed for Medicaid patients. They are also the subject of a Grand Jury investigation into allegations of Medicaid fraud, including a claim that each of them received Medicaid payments for services rendered to patients in New York while the doctors were actually out of the country.

On December 14, 1984 each of the petitioners was served with a subpoena, issued by the Deputy Attorney General for Medicaid Fraud Control, requiring appearance before the Grand Jury and production of certain records covering a period from January 1, 1981 to December 31, 1983. Dr. X, the sole practitioner, was directed to produce "such records as [are] required by law to be kept, which reflect the evaluation and treatment * * * [and] which disclose fully the extent of care, services and supplies provided under the New York State Medicaid Program" to approximately 167 patients listed in an attached schedule. The subpoena served on Dr. Y ordered "[a]ny Officer, Director or Managing Agent" of the professional corporation to produce various corporate records, including "patient charts" for over 150 "Medicaid recipients listed in Schedule 'A' annexed hereto." There is no indication that any of the patients whose records were sought had executed waivers.

Each of the petitioners moved to quash the subpoenas principally on the grounds that requiring them to produce the records would violate their rights under the Fifth Amendment of the United States Constitution against self-incrimination and their patients' statutory physician-patient privilege.

The trial court denied the motions. The court held that the Fifth Amendment privilege could not be asserted with respect to corporate records or records required to be kept by law. Relying on our decision in *Matter of Camperlengo v. Blum*, (56 NY2d 251), the court also concluded that the physician-patient privilege was abrogated when medical records are sought in an investigation of fraudulent Medicaid practices.

The Appellate Division modified. That court agreed that the Fifth Amendment provided no basis for quashing the subpoenas. However, also relying on our decision in *Matter of Camperlengo*, the court concluded that in a Medicaid investigation, the physician-patient privilege was abrogated only to the extent necessary to insure that Medicaid funds are being properly applied. The court concluded that this imposed "a requirement of particularized need before the production of medical records

otherwise protected by the privilege may be required" (113 AD2d 49, 54). The court remitted to have the trial court conduct an *in camera* inspection to determine which portions of the records should be made available to the Grand Jury.

On this appeal the Deputy Attorney General urges that the physician-patient privilege is completely inapplicable to Medicaid investigations and that in such cases those conducting the investigation should have unrestricted access to medical records of Medicaid patients, without having to make any showing of need for the particular record. He claims that this is required by the Federal Law relating to Medicare, by our own prior decisions and by the public policy against delaying Grand Jury instructions.[1]

The statutory privilege protects confidential communications between patient and physician in order to protect the patient from "humiliation, embarrassment, or disgrace" (*Steinberg v. New York Life Ins. Co*, 263 NY 45, 48). The theory is that a person in need of medical attention should be encouraged to make full and candid disclosure of all matters necessary to treatment by being assured that what is disclosed to the doctor will not be revealed to others without the patient's consent (3 Commission on Revision of Statutes of NY, at 737 [1836]). The privilege is personal to the patient but may be asserted by the physician in the absence of a waiver by the patient (*Prink v. Rockefeller Center*, 48 NY2d 309, 314-315).

A number of exceptions have been recognized, but there is no exception for Grand Jury proceedings or criminal investigations generally (*Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d 130, 135-136). A physician, medical

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[1] Contrary to the dissent, the question of the subpoena's overbreadth may be considered on the merits in this Court. Unlike *Matter of Camperlango v. Blum, supra*, where the petitioners did not argue before our Court that the subpoena is overbroad, the petitioners here have made such an argument on this appeal. The fact that the petitioners did not raise this point in the trial court does not preclude us from considering it here because the rights of third parties not before the Court would be affected by the disclosure (*Matter of Johnson Newspaper Corp. v. Stainkamp*, 61 NY2d 958).

facility and others may assert the privilege before a Grand Jury, unless the patient was a victim of the one asserting the privilege (*Matter of Grand Jury Investigation of Onondaga County, supra*, p. 135). However in *Matter of Camperlengo v. Blum, supra*, we did recognize an exception for Medicaid investigations. In that case, involving a subpoena issued in connection with an administrative investigation by the Department of Social Services, we stated (at p. 255): "Although there is no express statutory exception to the privilege for Medicaid-related records, the Federal and State record-keeping and reporting requirements evidence a clear intention to abrogate the physician-patient privilege to the extent necessary to satisfy the important public interest in seeing that Medicaid funds are properly applied."

The Deputy Attorney General contends that this decision and the subsequent holding in *Matter of Doe v. Kuriansky*, (91 AD2d 1068, *affd* 59 NY2d 836) applying the exception to Grand Jury proceedings initiated by the Medicaid Fraud Unit establish a right of unrestricted access to medical records of Medicaid recipients in the case now before us. In *Matter of Camperlengo*, the petitioner broadly contended that the privilege could be asserted to deny the investigators access to all medical records, and in *Matter of Doe*, the petitioner made a contention, nearly as broad, that all patients' names should be redacted from the medical records, and that all medical information should be deleted from certain non-medical records. Although we rejected those contentions, we did not consider whether a more narrow assertion of the privilege, addressed to particularly sensitive matter apparently unnecessary to the investigation, would prove unavailing. Indeed in *Matter of Camperlengo* we noted that we had "no occasion to delineate the precise boundries of the exception" because the petitioner there had abandoned any claim that the subpoena was overly broad (*Matter of Camperlengo v. Blum, supra*, p. 256)

The Deputy Attorney General contends that any rule denying Medicaid investigators unfettered access to medical records of Medicaid recipients is inconsistent with Federal law and would jeopardize this State's right to receive Medicaid funds.

Concededly a State participating in the Medicaid program must comply with the Federal statutes which require Medicaid providers to maintain and furnish to appropriate authorities "such records as are necessary fully to disclose the extent of the services provided." (42 US. §1396a[a][27]). But the exception to the physician-patient privilege resulting from this requirement is "intended to be no broader than necessary for effective oversight of the Medicaid program" (*Matter of Camperlengo v. Blum, supra*, p. 256). Thus Medicaid investigators have an unqualified right to review all records needed for the investigation, even though they may contain privileged matters not necessary to the Medicaid investigation even though they may contain privileged, and extremely sensitive, material. It is only privileged matters not necessary to the Medicaid investigation which need not be disclosed (*see, Commonwealth v. Kobrin*, 395 Mass 284, 479 NE2d 674). This minimal and occasional qualification of the investigators' powers is consonant with Federal objectives and would not jeopardize the State's Medicaid entitlements.

The Deputy Attorney General's objection to this rule is essentially prodedural. He apparently claims no right to obtain records which are clearly unnecessary to the investigation. However, he contends that Medicaid investigations will be unduly delayed if investigators are generally required to appear in court and prove that subpoenaed records containing privileged material are necessary to the investigation. This is a legitimate concern, but we do not impose any such broad, generalized requirement on those conducting Medicaid investigations.

In most instances the information sought by Medicaid investigators is either not privileged, or of such a nature that its relevance to a Medicaid investigation is readily apparent. For instance, the identity of patients as well as the dates of treatment is not covered by the physician-patient privilege (*Matter of Grand Jury Investigation of Onondaga County, supra*, p. 134-135; *Lorde v. Guardian Life Ins. Co. of America*, 252 App Div 646). The diagnosis and the nature and extent of treatment are privileged (*Matter of Grand Jury Investigation of Onondaga County, supra*, p. 135), but are obviously necessary for

those investigating the validity of a claim, which has been submitted for payment, or paid out of Medicaid funds. Records of this nature should be routinely disclosed to those charged with making such investigations. Merely asserting the privilege is not enough; something more must be shown before court intervention would be warranted. It is only in the rare instance where the record sought contains highly sensitive matter having no apparent relevance to the Medicaid investigation, that a claim of privilege need be considered. In those instances the burden is on the person asserting the privilege to identify the particular record. If the court agrees that an explanation is warranted, the the burden would be on the investigator to show why disclosure of that record is necessary to the investigation.

The investigator's response need not be burdensome or subject to dilatory abuses. He should not be obligated to show a "particularized need", as would be required for disclosure of Grand Jury minutes (*see, Matter of District Attorney of Suffolk County*, 58 NY2d 436, 444). Disclosure of medical records to Medicaid investigators is not public disclosure. Under both Federal and State law information obtained in that manner must remain confidential within the confines of the Medicaid investigation (*Matter of Camperlengo v. Blum, supra*, p. 256). Thus a showing that the record sought, although unusually sensitive and otherwise privileged, reasonably and minimally comes within the scope of the investigation, should suffice to authorize limited disclosure to Medicaid investigators.

In the case now before us the subpoenas are so broadly worded as to require the psychiatrists to disclose all records relating to treatment, including consultation notes of all psychotherapeutic sessions with the patient. This, we have noted, is particularly sensitive matter (*Cynthia B. v. New Rochelle Hosp. Med. Center*, 60 NY2d 452, 459). The nature of the record, however, is not alone sufficient to satisfy the custodian's burden of demonstrating that a particular record or portion of a record contains highly sensitive material apparently bearing no relevance to the investigation. In this case, the custodians made no such showing, which generally would require the court to

deny them any relief with respect to the subpoena. Remittal is appropriate here solely because the petitioners had no opportunity to meet the standard we now establish.

With respect to the petitioners' cross appeal, the courts below properly held that compliance with the subpoenas would not infringe the petitioner's Fifth Amendment rights. As noted, the subpoena served on Dr. X sought only records required to be kept by law, and the subpoena served on Dr. Y sought only corporate records, most of which are also required to be kept by law. It is settled that a corporation has no Fifth Amendment privilege and that a custodian of corporate records may not refuse to produce them even though they may incriminate him personally (*Bellis v. United States*, 417 US 85, 88: *Bleakly v. Schlesinger*, 294 NY 312). It is also settled that the Fifth Amendment privilege may not be asserted with respect to records required to be kept by law. (*Shapiro v. United States*, 335 US 1; *People v. Doe*, 59 NY 655).

Petitioners concede that the Fifth Amendment privilege does not apply to the content of these records. They contend, however, that the act of producing the records may be incriminatory because the petitioners would be admitting that the records exist, that they are in the petitioners' possession and that they are accurate. They urge that recent Supreme Court decisions (*United States v. Doe*, 465 US 605; *Fisher v. United States*, 425 US 391) undermine the settled law and would now permit the custodians of corporate records and required records to refuse to produce them when the act of production would itself be incriminatory. These cases, however, did not expressly overrule the prior cases, and in the most recent case the Supreme Court noted that the rule announced "concerns only business documents and records not required by law to be kept or disclosed to a public agency." (*United States v. Doe*, *supra*, p. 607, fn 3).

Accordingly, the order of the Appellate Division should be affirmed.

SIMONS, J. (dissenting):

In my view, reinstatement of Supreme Court's orders is compelled by three recent decisions of this court.

In *Virag v. Hynes* (54 NY2d 437), we detailed the fundamental difference between grand jury subpoenas, which are presumptively valid, and office subpoenas, which are more readily subject to attack on relevancy grounds. We held that because of the presumption of validity, a prosecutor has no affirmative burden, when a motion is made to quash, to announce the scope or purpose of the grand jury's investigation or to establish the relevancy of the materials sought by it. The grand jury is an arm of the court and "[n]o witness may avoid obedience to the directions of the court without establishing by concrete evidence that the subpoena was issued in bad faith or that it is for some other reason invalid" (*id.* 442-443, quoting from *Matter of Spector v. Allen*, 281 NY 251, 257). Any other rule, we said, would result in needless delays of the grand jury's deliberations while mini-trials were held to test subpoenas and would thereby impose an intolerable burden on the investigation and prosecution of crime (*id.* at 442-445). In the absence of such "concrete evidence" of invalidity, the motion to quash must be denied.

Matter of Camperlengo v. Blum (56 NY2d 251) involved a Medicaid fraud investigation by the Department of Social Services in which the Department issued an office subpoena seeking production of a psychiatrist's records. The psychiatrist moved to quash the subpoena on the ground that the patients' records were privileged. We denied the motion, holding that the statutory physician-patient privilege would not be recognized in Medicaid fraud investigations. Accordingly, we ordered production of the complete records of 35 Medicaid patients. Our decision was based upon the public's strong interest in discovering and punishing such frauds, upon the relationship between the state and federal governments in Medicaid matters, and upon our determination that the statutory record-keeping requirements of the federal government superseded the state's

statutory privilege (for similar statutes superseding CPLR 4504 see Family Court Act §1046, subd a, par [vii] and Public Health Law §3373).

In Matter of Doe v. Kuriansky (59 NY2d 836, *affg for reasons stated below*, 91 AD2d 1068), a hospital sought to quash a subpoena seeking the names of patients and certain medical information concerning them contained in non-medical records. We applied the rules of *Virag* and *Camperlengo* and held that, when subpoenaed, a hospital under investigation for Medicaid fraud must produce complete and unredacted records. The decision expressly states the rule that the statutory privileges, including the physician-patient privilege, do not apply or restrict information subject to grand jury subpoena in Medicaid fraud investigations.

In this case, the Deputy Attorney-General investigating Medicaid fraud issued presumptively valid grand jury subpoenas seeking petitioners' patient records. Petitioners moved to quash on constitutional grounds, which the court finds to be without merit. They also claimed that the subpoenas should be quashed because of the physician-patient privilege, notwithstanding our earlier decisions in *Camperlengo* and *Doe*. Although petitioners make much of the point now, their moving papers before Special Term did not contain any claim, let alone the "concrete evidence" required by *Virag*, that the information sought was irrelevant or the subpoena overbroad, nor did they urge that the rule in *Camperlengo* was less than absolute or the decision in *Doe* reaffirming it, was wrong or, for any reason, inapplicable to these subpoenas.

Notwithstanding these decisions and the nature of petitioners' claims at Special Term, the majority finds that overbreadth may indeed be found because of the physician- patient privilege unless the prosecutor justifies the need for the information sought. It does so because it interprets *Camperlengo* as holding that the exception to the privilege in Medicaid fraud investigations is not absolute and no broader than necessary for effective oversight of the Medicaid program (*see*, *Matter of Camperlengo v. Blum*, 56 NY2d 251, 255-256, *supra*). That

qualification was explained by the sentence immediately following it, however. The court made clear that the exception created by the federal record-keeping requirement did not override the physician-patient privilege generally but only that no privilege could be asserted to permit withholding information "directly connected with administering the Medicaid program". It elaborated on the point by citing statutes preventing disclosure to unauthorized parties or agencies, i.e., US Code, tit 42 § 1396a, subd [a], par [7]; Social Services Law §§136, 367[b], subd 4; § 369, subd 3 (*id.* at 256), thus making clear that this "no broader than necessary" language was intended only to avoid disclosure of patients' records to persons other than those charged with oversight of the Medicaid program. This was confirmed by our decision in *Matter of Doe v. Kuriansky*, 59 NY2d 836, *supra*) which granted the grand jury unrestricted access to patients' records. Thus, *Camperlengo* did not create any obligation on the part of the Attorney General to specify the need for each part of the records subpoenaed, rather it delineated the use to which the records could be put when subpoenaed.

This proceeding involved an on-going investigation of psychiatrists charged with fraudulent Medicaid billing, as did *Camperlengo*, a grand jury subpoenas presumtively valid, as in *Virag*, and patient records subject to production without redaction, as in *Doe*. It would seem self-evident that at this stage of the proceedings the prosecutor cannot know, and should not be required to detail, the scope and purpose of his investigation or the need for the records. The grand jury will necessarily need the complete records because the nature and amount of the charges, to say nothing of their legitimacy, will depend on the patients' complaints and the services rendered to treat them. Nevertheless, the majority, based upon motion papers which do not assert even an arguable basis for an overbreadth or relevancy claim, and citing *Cynthia B. v. New Rochell Hosp. Med. Center* (60 NY2d 452), a case which does not involve Medicaid fraud and is not in point, has required the prosecutor to establish the grand jury's need for the records. although petitioners have not alleged "the concrete evidence" required to warrant an inquiry into the validity of the subpoenas and do not

now claim any irregularity in them, they are to be given an opportunity to fashion such an objection at a hearing at which the prosecutor must shoulder the burden of sustaining the grand jury's requests for this information. In my judgment, this ruling realigns the presumption and burdens of proof established in *Virag*, misconstrues our decision in *Camperlengo* and overrules our holding in *Doe*. I, therefore, dissent in part and vote to modify the order of the Appellate Division by reinstating the orders of Supreme Court, New York County.

* * *

Order affirmed, without costs. Question certified answered in the affirmative. Opinion by Chief Judge Wachtler in which Judges Kaye, Alexander, Titone, Hancock and Bellacosa concur. Judge Simons dissents in part and votes to modify by reinstating the orders of Supreme Court, New York County, in an opinion.

Decided February 19, 1987

OPINION OF THE APPELLATE DIVISION

SUPREME COURT,
APPELLATE DIVISION
First Department, June 1985

Leonard H. Sandler, J.P.,
Joseph P. Sullivan
E. Leo Milonas
Bentley Kassal
Ernst H. Rosenberger, JJ.

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In re Grand Jury Subpoenas Duces Tecum
dated December 14, 1984,

Y, M.D., P.C.,

Petitioner-Appellant,

—against—

HON. EDWARD KURIANSKY, DEPUTY ATTORNEY
GENERAL OF THE STATE OF NEW YORK,

Respondent-Respondent.

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In re Grand Jury Subpoenas Duces Tecum
dated December 14, 1984,

X, M.D.,

Petitioner-Appellant,

—against—

HON. EDWARD KURIANSKY, DEPUTY ATTORNEY
GENERAL OF THE STATE OF NEW YORK,

Respondent-Respondent.

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Appeals by the petitioners-appellants from orders of the Supreme Court,

New York County (Peter J. McQuillan, J.), entered on May 10, 1985 which denied their respective motions to quash grand jury subpoenas duces tecum.

Robert Dublirer, of counsel (Michael L. Rice, Lawrence N. Gray and Shirley F. Norris with him on the brief; Edward J. Kuriansky) Deputy Attorney General, pro se

Gerald B. Lefcourt and Lawrence S. Goldman, of counsel (Joshua L. Dratel and Roger Parloff with them on the brief; Gerald B. Lefcourt, P.C. and Goldman & Hafetz, attorneys) for the appellants

SANDLER, J.

On December 14, 1984, New York County Grand Jury subpoenas duces tecum were issued by the Office of the Deputy Attorney General for Medicaid Fraud Control to petitioners X and Y, both psychiatrists who practice on the Lower East Side of Manhattan, and both Medicaid providers. The petitioners are under investigation for alleged fraudulent billings of Medicaid patients, the specific allegation being that each received payments for medical services alleged to have been rendered when the petitioners were physically located outside the United States.

The subpoena issued to petitioner X, a sole practitioner, directed him to produce before the grand jury records "as required by law to be kept" reflecting the evaluation and treatment of certain named patients and disclosing "the extent of care, services and supplies provided" to these patients under the New York State Medicaid Program during the period of January 1, 1981 to December 31, 1983, inclusive.

The subpoena issued to petitioner Y, who since August, 1980 has practiced as a professional corporation, directs "[a]ny Officer, Director or Managing Agent" of Y.P.C. to produce before the grand jury: "1. All payroll records, including payroll journals, individual earnings cards, IRS forms 971, W2 and W4 and NYS Form WRS-2 for calendar years 1981, 1982 and 1983; 2. Individual personnel files for all employees; 3. Patient charts for all Medicaid recipients listed in Schedule 'A' annexed hereto."

Both petitioners moved in the Supreme Court, New York County, to quash the subpoenas on the grounds that compelled production of these privately-held documents would violate their constitutional privilege against self-incrimination, and that the disclosure of the information sought would violate the constitutional right of privacy of their patients and the physician-patient privilege.

In two opinions Criminal Term of the Supreme Court denied both petitioners' applications. Relying on the "required records"

doctrine, the court held as to both petitioners that no Fifth Amendment protection attached to records which are required by law to be kept and which are subject to governmental regulation and inspection. The court further ruled in both cases that the physician-patient privilege yielded to federal law and state regulatory provisions explicitly requiring physicians in the Medicaid program to maintain records and to produce them upon request to governmental authorities. With respect to Y, the court also found that Y could assert no Fifth Amendment privilege under the principle that a corporation has no Fifth Amendment privilege to assert.

We are in agreement with Criminal Term that petitioners' Fifth Amendment claims are unavailing for the reasons set forth in the trial court's opinions. With regard to that part of petitioners' claim that rests on the physician-patient privilege, we modify to the extent of remanding to Criminal Term for an *in camera* inspection of the subpoenaed medical files with a view to determining whether or not, and if so to what extent, production of those records are "necessary to satisfy the important public interest in seeing that Medicaid funds are properly applied." *Matter of Camperlengo v. Blum*, 56 NY2d 251.

Turning first to petitioners' Fifth Amendment claims, the thesis is advanced that in two recent decisions (*Fisher v. United States*, 425 U.S. 391, and *United States v. Doe*, 104 S.Ct. 1237) the Supreme Court ended the traditional content- oriented approach to Fifth Amendment protection with two consequences asserted to be here dispositive. First, it is contended that in *United States v. Doe*, the Supreme Court's determination that the Fifth Amendment privilege does not apply to the contents of voluntarily prepared business records implicitly overruled the required records doctrine announced in *Shapiro v. United States*, 335 U.S. 1, which in substance denied Fifth Amendment protection to records required by law to be maintained. Secondly, it is argued that in *Fisher* and *Doe*, the Supreme Court stated that the Fifth Amendment may be invoked with regard to the production of records whose contents are not privileged, where

the authentication of the records implicit in the act of production may be testimonially incriminatory, and that this principle logically should be available to the custodians of corporate records and required records.

As to petitioners' first contention, we are not persuaded that the Supreme Court in *Doe* overruled, or intended to overrule, *Shapiro v. United States*, *supra*, nor do we believe that the *Doe* decision is irreconcilable with the continued viability of the required records doctrine.

More substantial is petitioners' contention with regard to the alleged right under *Fisher* and *Doe* of custodians of corporate records and of required records to invoke the privilege with regard to production of such records where the act of production may be testimonially incriminatory. The issue has led to apparently divergent opinions among Federal Circuit Courts of Appeals. (Compare *In re Grand Jury Matter, Appeal of James Gilbert Brown*, 768 F2d 525 [3d Cir. 1985] with *In re Two Grand Jury Subpoenae Duces Tecum, One Dated Jan. 28, 1985, The Other Undated*, #85-6067 [2d Cir. 1985]).

From a careful review of the Supreme Court's opinions in *Fisher* and *Doe*, it is clear that they do not set forth explicitly the principle contended for by the petitioners with regard to the production of corporate and required records by custodians. Nor are we persuaded that the analysis set forth in those opinions clearly point to the eventual adoption of the doctrine urged by petitioners.

In *Fisher*, as was congently observed in the dissenting opinion in *In re Grand Jury Matter, Appeal of James Gilbert Brown*, *supra*, 768 F2d 525, 532, the Supreme Court referred with approval to decisions which had denied the availability of the privilege against self-incrimination to custodians of corporate records who sought to avoid production of the records. We think it improbable that the Supreme Court in *Doe*, a case not presenting the issue, intended its analysis to overrule, without saying so, a well-established doctrine that the court had reaffirmed only a few years previously. In any event, we see

nothing in the two decisions relied upon by petitioners to justify this court in departing from a principle which has been set forth explicitly by the New York Court of Appeals. See e.g., *Matter of Bleakley v. Schlesinger*, 294 NY 312; cf. *Big Apple Concrete Corp. v. Abrams*, 103 AD2d 609.

The closest and most troublesome issue on this appeal is raised by the contention that the production of patient medical records, clearly demanded in the subpoenas duces tecum, would necessarily violate, and violate in a most disquieting way, the physician-patient privilege. CPLR 4504 [a] provides in pertinent part: "Unless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." The principle is of course clearly established the the privilege is fully applicable to grand jury proceedings in the absence of any clear declaration of legislative intent to override the privilege in particular situations. See *In the Matter of a Grand Jury Investigation of Onondaga County*, 59 NY2d 130, 135.

In *Matter of Camperlengo v. Blum*, 56 NY2d 251, in which the issue was raised by the issuance of a subpoena duces tecum by the State Department of Social Services for the records of a psychiatrist concerning 35 Medicaid patients, the Court of Appeals addressed the question of "whether and to what extent the State and Federal regulatory provisions of the Medicaid program have . . . created an exception to the privilege" (at 255). Reviewing the relevant statutory and regulatory provisions, the Court of Appeals noted in particular that the Federal government requires states participating in the Medicaid program to provide for agreements with Medicaid providers under which the provider agrees: "(A) to keep such records as are necessary fully to disclose the extent of the services provided to individuals receiving assistance under the State plan, and (B) to furnish the State agency or the Secretary with such information, regarding any payments claimed by such person or institution for providing services under the State plan, as the State

agency . . . may from time to time request (US Code, title 42, §1396a, subd [a], par [27]." (Ibid) The court further noted that New York State regulations require such information to be kept by Medicaid providers for a minimum of six years after payment and made available to the appropriate agencies (18 NYCRR 540.7[a][8]).

From this review, the Court of Appeals concluded (at 225-256):

> "[T]he Federal and State record-keeping and reporting requirements evidence a clear intention to abrogate the physician-patient privilege to the extent necessary to satisfy the important public interest in seeing that Medicaid funds are properly applied. Of course, this exception to the privilege is intended to be no broader than necessary for effective oversight of the Medicaid program."

In *Matter of John Doe v. Kuriansky*, 91 AD2d 1068, *affd* 59 NY2d 836, the principle set forth in *Camperlengo* was held to be equally applicable to a grand jury subpoena for medical records issued in the course of an investigation into Medicaid fraud by the Medicaid Fraud Control Unit of the Attorney-General's Office.

The critical issue is the meaning of that part of the *Camperlengo* rule that found an intention to abrogate the physician-patient privilege "to the extent necessary to satisfy the important public interest in seeing that Medicaid funds are properly applied." The circumstance that in *Camperlengo* the court sustained the subpoena in all respects does not seem to us dispositive of the question in view of the court's footnote observation (at 256) that it had "no occasion to delineate the precise boundaries of the exception" since petitioner had abandoned on the appeal any claim that the subpoena was overly broad.

The unusual, indeed unique, character of the patients' privacy interests in the records of psychotherapeutic sessions gives to the issue presented a special urgency and quality. As the Court

of Appeals observed in *Cynthia B. v. New Rochelle Hospital*, 60 NY2d 452, 459, psychiatric records "will often contain intimate details of past acts, hopes, fantasies, shames, and doubts that were divulged during treatment . . . ." Moreover, such records often include intimate observations and comments by patients with regard to indentifiable third persons who themselves are in no way concerned with the Medicaid program, and whose strong interest in the preservation of the scrupulous confidentiality of records reporting such observations is not lightly to be disregarded. Indeed, it seems a reasonable concern that the psychiatric treatment of patients by Medicaid providers is likely to be adversely affected in many situations if it is understood by patients and therapists that what the patient says, and what the therapist records, may in unforeseeable contingencies be made known to others, notwithstanding the obligation of the officials receiving the records to maintain their confidential character.

Turning to the rule formulated in *Camperlengo*, and in particular to the meaning of the word "necessary" in that rule, we recognize that the court may have intended the word to refer back to that part of the United States Code which required Medicaid providers to agree to keep "such records as are necessary fully to disclose the extent of the services provided." So interpreted, the *Camperlengo* rule would effectively suspend the application of the physician-patient privilege with regard to records required by law and regulation to be maintained. We are persuaded, however, that the *Camperlengo* rule was more likely intended to impose a requirement of particularized need before the production of medical records otherwise protected by the privilege may be required. Although the question is not free from doubt, this conclusion seems to us implicit in the footnote in *Camperlengo* that the court had "no occasion to delineate the precise boundaries of the exception" in view of that petitioner's abandonment of the issue of overbreadth. We observe that this was the view of *Camperlengo* taken by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Kobrin*, 395 Mass. 284 (July 2, 1985) in an opinion which carefully and thoughtfully analyzed in an analogous context essentially the same issue that is here presented.

In the instant case the single concrete circumstance offered in support of the challenged subpoenas duces tecum, although stated to be not the only circumstance, is the allegation that the Deputy Attorney General has information that petitioners obtained Medicaid reimbursement for services rendered while they were not physically present in this country. By itself this would establish the grand jury's clear right to receive records fixing the dates of treatment of the various patients as well as the times the treatments started and ended, matters as to which the privilege is in any event inapplicable. (See *In the Matter of a Grand Jury Investigation of Ononadaga County*, 59 NY2d 130, *supra*, at 134; *Henry v. Lewis*, 102 AD2d 430, 437.) However, nothing specifically set forth by the Deputy Attorney General appears to demonstrate a clear need for an examination of the petitioners' notes taken during psychotherapeutic sessions, or of the petitioners' diagnosis and evaluation of individual patients, evaluations often phrased in terms that would be damaging to patients if known to others, and that may in certain instances be painful to the patients themselves.

A judicial *in camera* examination of the subpoenaed medical records and personnel files is clearly necessary in order to identify those portions of the records that establish dates and times of treatment. If the *in camera* examination discloses a particularized need for production of parts of the medical records that would otherwise be protected by physician- patient privilege, and that impinge on the privacy interests of the patients and others, it will be incumbent on the Trial Term Judge to redact the records to be produced in a manner that would satisfy the needs of the grand jury investigation without unnecessarily breaching the privacy interests of the patients and others.

Illustratively we note that in *Commonwealth v. Kobrin*, *supra*, the Supreme Judicial Court of Massachusetts suggested that, in lieu of directing the production of notes of psychotherapeutic session, a physical description of such notes should be furnished by the court that would indicate their scope and extent but not the substance of the sessions. An examination of the records here may suggest to the Trial Term Judge other

methods for reconciling the various interests involved. We also note that Trial Term's examination of the records may be assisted by further factual submissions by the parties.

Accordingly, the orders of the Supreme Court, New York County (Peter J. McQuillan, J.), Trial Term Part 92, entered May 10, 1985, denying the motions of petitioners to quash grand jury subpoenas duces tecum and ordering compliance, is modified on the law, without costs, to vacate that part of the orders which denied the motion with regard to records embraced by the physician-patient privilege, and to remand to Trial Term for a judicial *in camera* examination of such records to determine whether, and if so to what extent, there is disclosed a particularized need for the production of privileged parts of the records.

All concur.

Order filed.

November 14, 1985

ORDER OF SUPREME COURT, TRIAL TERM AS TO Y, P.C.

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IN RE GRAND JURY SUBPOENA DUCES TECUM ISSUED TO Y, P.C., DATED DECEMBER 14, 1984.

Index #1095/85
ORDER

---------- X

Petitioner, having moved on January 14, 1985 for an order quashing or, in the alternative, modifying a grand jury subpoena duces tecum, and for a further order staying compliance with said subpoena until the hearing and determination of the motion to quash and/or modify said subpoena:

NOW, upon reading and filing the Notice of Motion of Gerald B. Lefcourt, Esq., dated January 14, 1985; the affirmation of Gerald B. Lefcourt, Esq., dated January 14, 1985; the supplemental affirmation of Gerald B. Lefcourt, Esq., dated January 30, 1985; the Memorandum of Law in Support of Petitioner's Motion to Quash the Subpoena; the Affirmation of Special Assistant Attorney General Shirley F. Norris, dated February 5, 1985; and the Memorandum of Law in Opposition to Petitioner's Motion to Quash the Subpoena Duces Tecum;

AND, upon hearing Gerald B. Lefcourt, Esq., on behalf of the petitioner and Special Assistant Attorney General Michael L. Rice, on behalf of the respondent on February 14, 1985, and upon the decision of this Court, dated March 4, 1985, directing that an order be settled, it is

ORDERED that petitioner's motion to quash and/or modify the subpoena duces tecum be, and the same hereby is, denied, and it is

FURTHER ORDERED, the petitioner fully comply with said subpoena duces tecum on Wednesday, the 17th day of April, 1985, at 1:00 in the afternoon, at the Grand Jury, located on the 16th floor, 270 Broadway, City, County and State of New York.

/s/

PETER J. McQUILLAN
Justice of the Supreme Court

Dated: New York, New York
March 25, 1985

ORDER OF SUPREME COURT, TRIAL TERM AS TO X

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IN RE GRAND JURY SUBPOENA DUCES TECUM ISSUED TO X DATED DECEMBER 14, 1984.

Index #818/85
ORDER

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Petitioner, having moved on January 10, 1985 for an order quashing or, in the alternative, modifying a grand jury subpoena duces tecum, and for a further order staying compliance with said subpoena until the hearing and determination of the motion to quash and/or modify said subpoena:

NOW, upon reading and filing the Notice of Motion of Goldman & Hafetz, Esqs., dated January 10, 1985; the supplemental affirmation of Lawrence S. Goldman, Esq., dated January 30, 1985; the Memorandum of Law in Support of Petitioner's Motion to Quash the Subpoena; the Affirmation of Special Assistant Attorney General Shirley F. Norris, dated February 5, 1985; and the Memorandum of Law in Opposition to Petitioner's Motion to Quash the Subpoena Duces Tecum;

AND, upon hearing Lawrence S. Goldman, Esq., on behalf of the petitioner and Special Assistant Attorney General Michael L. Rice, on behalf of the respondent on February 14, 1985, and upon the decision of this Court, dated March 4, 1985, directing that an order be settled, it is

ORDERED that petitioner's motion to quash and/or modify the subpoena duces tecum be, and the same hereby is, denied, and it is

FURTHER ORDERED, the petitioner fully comply with said subpoena duces tecum on Wednesday, the 17th day of April, 1985, at 1:00 in the afternoon, at the Grand Jury, located on the 16th floor, 270 Broadway, City, County and State of New York.

/s/

PETER J. McQUILLAN
Justice of the Supreme Court

Dated: New York, New York
March 25, 1985

ORDER OF SUPREME COURT, TRIAL TERM AS TO Y, P.C.

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IN RE GRAND JURY SUBPOENA *DUCES TECUM* ISSUED TO Y, P.C., DATED DECEMBER 14, 1984.

Index No. 1095/85

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McQUILLAN, J.:

Petitioner makes application to quash a grand jury subpoena *duces tecum* on the grounds, *inter alia*, that production of the documents sought will violate his constitutional privilege against self-incrimination, and that disclosure of the information in the documents will violate the physician-patient privilege.

Petitioner is a psychiatrist who practices in a clinic on the lower east side of Manhattan. He is a Medicaid provider and the sole shareholder, employee and director of "Y, P.C." Since Ausust, 1980, petitioner has operated at the clinic as a professional corporation.

Currently, petitioner is under investigation by the Office of the Deputy Attorney General for Medicaid Fraud Control. The inquiry is focusing on whether Medicaid provider forms submitted to the State were for services not performed at all, or for services and time periods in excess of those actually performed or expended.

The subpoena directs "[a]ny officer, Director or Managing Agent" of Y, P.C. to produce before the grand jury "1. All payroll records, including payroll journals, individual earnings cards, IRS forms 971, W2 and W4 and NYS Form WRS-2 for calendar years 1981, 1982 and 1983; 2. Individual personnel files for all employees; 3. Patient charts for all Medicaid recipients listed in Schedule 'A' annexed hereto."

The law is clear that a corporation has no Fifth Amendment privilege to assert. Fisher v. United States, 425 U.S. 391, 411-12 (1976); Bellis v. United States, 417 U.S. 85, 88-9 (1974); United States v. White, 322 U.S. 694 (1944). Petitioner may not therefore withhold relevant materials on Fifth Amendment grounds. Big Apple Concrete Corp. et al. v. Attorney General of the State of New York, NYLJ, 11/13/84, at 1, col. 6 (1st Dept.).

Alternatively, many of the records sought were required to be compiled, preserved and produced pursuant to Federal and New York State regulations. As "required records," they are not protected by the Fifth Amendment. Shapiro v. United States, 335 U.S. 1 (1948); People v. Doe, 59 N.Y.2d 655 (1983).

Contrary to petitioner's contention that the recent decision of the United States Supreme Court in United States v. Doe, 104 S.Ct. 1237 (1984) "sounded the death knell for the much criticized 'required records' doctrine," Memorandum of Law in Support of Petitioner's Motion to Quash the Subpoenas at p.5, the Court stated therein at 1240 n.3: "We . . . understand that this case concerns only business documents and records not required by law to be kept or disclosed to a public agency." United States v. Doe was not concerned with required records and nothing in its analysis could be fairly construed as weakening the required records exception.

Petitioner also contends that, even if not privileged under the Fifth Amendment, the subpoenaed records are still beyond the subpoena's reach since they fall within the CPLR 4504 physician-patient privilege. In Camperlengo v. Blum, 56 N.Y.2d 251 (1982), however, the Court of Appeals cited Federal law (42 U.S.C. 1396(a) [27]) and State regulatory provisions (18 NYCRR 540.7(1)(8)) explicitly requiring physicians participating in the Medicaid program to maintain records and to furnish them upon request as evidence of a clear intent to abrogate the physician-patient privilege in the case of the medical records sought in an investigation of fraudulent Medicaid practices. Id. at 255. Thus, petitioner's reliance on the physician-patient privilege as a legal excuse for non-compliance with the subpoena is misplaced here.

Accordingly, the application to quash the grand jury subpoena *duces tecum* is denied in all respects.

Settle order.

DATED: March 4, 1985.

/s/

PETER J. McQUILLAN
Justice of the Supreme Court

ORDER OF SUPREME COURT, TRIAL TERM AS TO X

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IN RE GRAND JURY SUBPOENA *DUCES TECUM* ISSUED TO X DATED DECEMBER 14, 1984.

Index No. 818/85

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McQUILLAN, J.:

Petitioner makes application to quash a grand jury subpoena *duces tecum* on the grounds, *inter alia*, that production of the documents sought will violate his constitutional privilege against self-incrimination, and that disclosure of the information in the documents will violate the physician-patient privilege.

Petitioner is a psychiatrist who practices in a clinic on the lower east side of Manhattan. He is a Medicaid provider and sole practitioner.

Currently, petitioner is under investigation by the Office of the Deputy Attorney General for Medicaid Fraud Control. The inquiry is focusing on whether Medicaid provider forms submitted to the State were for services not performed at all, or for services and time periods in excess of those actually performed or expended.

The subpoena directs petitioner to produce before the grand jury "[s]uch records as required by law to be kept, which reflect the evaluation and treatment of the patients whose names appear on the schedule annexed hereto during the period January 1, 1981 through December 31, 1983, inclusive; and such records, as required by law to be kept, which disclose fully the extent of care, services and supplies provided under the New York State Medicaid Program during the period January 1, 1981 through

December 31, 1983, inclusive, to the individuals whose names and Medicaid recipient identification number appear on the Schedule annexed hereto."

As petitioner himself concedes, the records sought were required to be compiled, preserved and produced pursuant to Federal and New York State regulations. As "required records," they are not protected by the Fifth Amendment. The Fifth Amendment privilege cannot be asserted with respect to records which are required by law to be kept, and which are subject to governmental regulation and inspection. Shapiro v. United States, 335 U.S. 1 (1948); People v. Doe, 59 N.Y.2d 655 (1983). "To hold otherwise and allow the privilege to cloak such records would make enforcement of State and Federal law impossible." People v. Doe, *supra* at 657.

Petitioner contends that the United States Supreme Court's recent decision in United States v. Doe, 104 S.Ct. 1237 (1984), "sounded the death knell for the much criticized 'required records' doctrine." Memorandum of Law In Support of Petitioners' Motion to Quash the Subpoenas at p.5. United States v. Doe, however, was not concerned with required records and nothing in its analysis could be fairly construed as weakening the required records exception. Indeed, the Court stated: "We . . . understand that this case concerns only business documents and records not required by law to be kept or disclosed to a public agency." United States v. Doe, *supra* at 1240 n.3.

Petitioner also contends that even if not privileged under the Fifth Amendment, the subpoenaed records are still beyond the subpoena's reach since they fall within the CPLR 4504 physician-patient privilege. In Camperlengo v. Blum, 56 N.Y.2d 251 (1982), however, the Court of Appeals cited Federal law (42 U.S.C. 1396(a)[27]) and State regulatory provisions (18 NYCRR 540.7(1)(8)) explicitly requiring physicians participating in the Medicaid program to maintain records and to furnish them upon request as evidence of a clear intent to abrogate the physician-patient privilege in the case of the medical records sought in an investigation of fraudulent Medicaid practices. Id. at 255. Thus, petitioner's reliance on the physician-patient

privilege as a legal excuse for noncompliance with the subpoena is misplaced here.

Accordingly, the application by petitioner to quash the grand jury subpoena *duces tecum* is denied in all respects.

Settle order.

DATED: March 4, 1985

/s/

PETER J. McQUILLAN
Justice of the Supreme Court